IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 25, 2006

STATE OF TENNESSEE v. DAISY MARIE GIBBS

Direct Appeal from the Criminal Court for Greene County
No. 05CR085 James E. Beckner, Judge

No. E2005-02504-CCA-R3-CD - Filed October 16, 2006

The defendant, Daisy Marie Gibbs, was convicted by a Greene County jury of burglary of an automobile, a Class E felony. As a result, she was sentenced to one year in the county jail. On appeal, the defendant argues that (1) the verdict was against the weight of the evidence, and (2) there was insufficient corroboration of her co-defendant's incriminating testimony. Following our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Michael A. Walcher, Assistant Public Defender, Greeneville, Tennessee, for the appellant, Daisy Marie Gibbs.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Amber DePriest and Cecil C. Mills, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant was convicted by a Greene County jury of burglary of an automobile.[1] The testimony from her trial was as follows:

Danny Johnson testified that he was a taxi cab driver for the Greeneville Cab Company. Mr. Johnson explained that when he knew he had an early shift, he would park his cab in the parking lot

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[1] We note that the defendant was charged and convicted of burglary of an automobile under the theory of criminal responsibility. *See* Tenn. Code Ann. § 39-11-401; -402.

of the bowling alley across from his home instead of in his driveway. Mr. Johnson remembered that on March 12, 2005, around 11:00 p.m., he happened to look out his bedroom window and saw a man, later identified as Jacob Stapleton, walking up to his car. Mr. Johnson stated that Mr. Stapleton stopped and looked at his car, opened the driver's side door, and stuck his head in the car. Mr. Johnson said that he yelled to his wife and son, "Who in the heck's in my car?" Upon apparently hearing him yell, Mr. Johnson stated that Mr. Stapleton slammed the car door shut and started walking toward the bowling alley.

Mr. Johnson testified that Mr. Stapleton went into the bowling alley and stood right inside the door. Mr. Johnson explained that he could see Mr. Stapleton the entire time because the bowling alley doors were glass and he could see inside from his bedroom window. Mr. Johnson recalled that Mr. Stapleton came back outside five or ten minutes later, walked across the bowling alley parking lot, and met a lady who appeared to be waiting on him at the Granite Monument Company beside Mr. Johnson's house. Mr. Johnson explained that he could not see the monument company from his bedroom window, but by this point he had stepped outside. Mr. Johnson elaborated that "I came out my door, and I . . . went off of the porch. My son stayed on the porch, and I went down . . . to confront him. He was talking to his girlfriend at this time." Mr. Johnson identified the defendant as the person he called the "girlfriend."

Mr. Johnson testified that he walked toward the monument company to confront the duo, but the defendant walked away. Mr. Johnson asked Mr. Stapleton why he had entered his car, but Mr. Stapleton ran away. Mr. Johnson stated that both the defendant and Mr. Stapleton headed toward a nearby shopping center. Mr. Johnson chased Mr. Stapleton while calling the police on his cell phone. Later that night, some police officers asked Mr. Johnson to identify two suspects they had in custody, one being the defendant, the other Mr. Stapleton.

Mr. Johnson testified that he knew the defendant from giving her rides in his cab in addition to recognizing her as the person sitting on the tombstone that evening. Mr. Johnson remembered that on occasion the defendant had been in his cab when he had dropped off other customers and had to pull his bank bag out from under the driver's seat.

On cross-examination, Mr. Johnson stated that nothing was taken from his taxi cab that evening. Mr. Johnson admitted that he might have told his son to get his gun when he went to confront the defendant and Mr. Stapleton at the monument company. On redirect examination, Mr. Johnson stated that the defendant had already started walking down the road before he made the comment about getting his gun.

Jacob Stapleton testified that the defendant was his girlfriend of two and one half years. Mr. Stapleton admitted that on the night in question, he opened the door of Mr. Johnson's car, looked around for money, and shut the door back. Mr. Stapleton said that the defendant was across the street serving as a lookout. He explained that the defendant was supposed to whistle if she saw anything. Mr. Stapleton stated that he did not take anything out of the car because Mr. Johnson came out on the porch. Upon seeing Mr. Johnson, Mr. Stapleton shut the car door and went into the

bowling alley for two minutes before walking down the street to meet the defendant. According to Mr. Stapleton, Mr. Johnson approached with a shotgun saying "he was going to call the law," so he ran, however, the defendant had already taken off.

On cross-examination, Mr. Stapleton acknowledged that he was offered a two-year sentence in exchange for his testimony against the defendant. Mr. Stapleton also acknowledged that when he was arrested he told the officer that he had gotten into a friend's car to get a pack of cigarettes but that was not true.

Greeneville City Police Officer Steve Hixson testified that he received the burglary call and headed toward the shopping center where the suspects were last seen. Officer Hixson saw the defendant cutting across the shopping center parking lot, and he yelled at her to stop but she did not. Officer Hixson explained that he got out of his car, approached the defendant, and engaged her in conversation while the other officers searched for Mr. Stapleton. Once Mr. Stapleton was located and brought to the shopping center, Officer Hixson asked the defendant if she knew Mr. Stapleton, and the defendant said no. Mr. Stapleton told the officers that the defendant was his girlfriend, after which the defendant apologized to Officer Hixson for lying to him. Officer Hixson noted that he found a flashlight in the defendant's jacket pocket while conducting a search incident to arrest.

The defendant testified that on March 12, 2005, around 10:30 p.m., she took her mother's flashlight and went to the bowling alley to watch the midnight bowling competition. The defendant said that as she was getting ready to leave, she overheard a friend ask Mr. Stapleton to get into her vehicle. The defendant further said that she waited in front of a tombstone while Mr. Stapleton went to a car and opened the door. According to the defendant, Mr. Stapleton did not put his head in the car, he simply noticed that what he was looking for was not there and went back into the bowling alley for approximately five minutes. As Mr. Stapleton exited the bowling alley, walking toward the monument company, the defendant saw another figure heading toward her saying "I'm calling the police, Citizen's arrest, Son, get my shotgun." The defendant said that she stood up and started walking when she heard "get my shotgun[.]" The defendant admitted that when Officer Hixson stopped her in the shopping center parking lot she lied to him when he asked her where she had been. The defendant stated that she was not serving as a lookout.

On cross-examination, the defendant acknowledged that at the time of the offense, Mr. Stapleton was her boyfriend and they were living together. The defendant also acknowledged that she had ridden in Mr. Johnson's cab before, but she maintained that she did not know he kept money in the vehicle. However, the defendant stated that since her arrest, she has been told that Mr. Johnson kept money on the seat of his car. The defendant also stated that the friend who asked Mr. Stapleton to get in her car drove the same type of car as Mr. Johnson. The defendant said that the friend's name was Ann Norton. The defendant testified that she could see Mr. Stapleton talking to Ms. Norton inside the bowling alley, off to the left of the entrance.

Upon the conclusion of the proof, the jury found the defendant guilty of burglary of an automobile and affixed a $1,500 fine. Following a sentencing hearing, the trial court sentenced the defendant to one year in the county jail.

ANALYSIS

The defendant argues that the verdict was contrary to the weight of the evidence and that there was insufficient corroboration of co-defendant Jacob Stapleton's incriminating testimony.

I.

We begin our review with the defendant's claim that the verdict was contrary to the weight of the evidence, or in other words, that the trial court should not have accepted the jury's verdict in performing its role as thirteenth juror. Rule 33(f) of the Tennessee Rules of Criminal Procedure imposes a duty on the trial court to serve as the thirteenth juror. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). If the trial court disagrees with the jury about the weight of the evidence, Rule 33(f) authorizes the trial court to grant a new trial. Tenn. R. Crim. P. 33(f). The trial court is not required to make an explicit statement on the record, but instead, when the trial court simply overrules a motion for new trial, this court may presume that the trial court has served as the thirteenth juror and approved the jury's verdict. *State v. Moats*, 906 S.W.2d 431, 434 (Tenn. 1995). Only if the record contains statements by the trial court indicating disagreement or dissatisfaction with the jury's verdict or evidencing the trial court's failure to act as the thirteenth juror may the reviewing court reverse the trial court's judgment. *Carter*, 896 S.W.2d at 122. Otherwise, our review is limited to a review of the sufficiency of the evidence. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993).

The record reveals that the trial court considered and overruled the defendant's motion for new trial; thus discharging its duty as the thirteenth juror. Therefore, our review is limited to a review of the sufficiency of the convicting evidence. *See id.* We reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006).

Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Tennessee Code Annotated section 39-14-402(a)(4) provides:

> (a) A person commits burglary who, without the effective consent of the property owner:
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> > (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

As it appears from the record, the defendant was charged and convicted under a criminal responsibility theory. *See State v. Hill*, 118 S.W.3d 380, 384 (Tenn. Crim. App. 2002). A defendant may be criminally responsible for an offense committed by another when, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2). Criminal responsibility is not a separate crime but instead a theory by which the state may prove the defendant's guilt based upon another person's conduct. *State v. Mickens*, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003).

In this case, the co-defendant, Jacob Stapleton, testified that the defendant was supposed to be a lookout and whistle if she saw anything that needed to be brought to his attention while he looked for money in Mr. Johnson's cab. In addition to the co-defendant's testimony, the evidence, in the light most favorable to the state, showed that the defendant was seated within viewing distance of Mr. Johnson's cab and watched Mr. Stapleton open the car door, stick his head in and look around, then shut the car door. Before this night, the defendant had ridden in Mr. Johnson's cab numerous times, including times Mr. Johnson had to retrieve his bank bag out from under his seat in the defendant's presence. When apprehended, the defendant initially lied to the police officer about her whereabouts and her relationship with Mr. Stapleton. The defendant also had a flashlight in her possession. The jury heard all the evidence, weighed the credibility of the witnesses, and returned a verdict of guilt. Consequently, we conclude the evidence was sufficient to support the defendant's conviction for burglary of an automobile.

II.

The defendant specifically complains that there was insufficient corroboration of co-defendant Mr. Stapleton's incriminating testimony. In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice. *State v. Bane*, 57 S.W.3d 411, 419 (Tenn. 2001); *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). "An accomplice is one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission

of a crime." *State v. Allen*, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). Our supreme court has held that in order to properly corroborate accomplice testimony

> [t]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's [testimony].

Shaw, 37 S.W.3d at 903 (quoting *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994)). Furthermore, independent evidence, though slight and entitled to little weight when standing alone, is sufficient to corroborate accomplice testimony. *State v. Heflin*, 15 S.W.3d 519, 524 (Tenn. Crim. App. 1999). However, evidence that merely casts suspicion on the accused is inadequate to corroborate an accomplice's testimony. *State v. Boxley*, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001) (citation omitted). The sufficiency of the corroboration is a determination for the jury. *Shaw*, 37 S.W.3d at 903.

Again, the co-defendant Mr. Stapleton testified that the defendant was supposed to serve as a lookout while he looked in Mr. Johnson's cab for money. As corroborative evidence, Mr. Johnson testified that he saw the co-defendant approach the defendant at the monument company minutes after the incident. Mr. Johnson noted that the defendant appeared to be waiting on Mr. Stapleton. When Mr. Johnson approached the two, the defendant took off walking away from him. Mr. Johnson recalled that the defendant had been a passenger in his cab several times and had in fact been present when he had to retrieve his money bag out from under his seat. Officer Hixson testified that the defendant initially lied about her whereabouts and her relationship with the co-defendant. Officer Hixson noted that the defendant had a flashlight in her possession. At trial, the defendant admitted that at the time of the offense the co-defendant was her boyfriend, and she had been waiting on him at the monument company while he looked for something in a friend's car but "noticed that what he was looking for wasn't there." As stated previously, evidence independent of accomplice testimony, though slight and circumstantial, is sufficient to corroborate the testimony of an accomplice. Accordingly, after reviewing the record, we conclude that sufficient corroborative evidence exists to uphold the defendant's conviction.

CONCLUSION

Based upon the aforementioned reasoning and authorities, we affirm the judgment of the Greene County Criminal Court.

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J.C. McLIN, JUDGE